NO. 24885-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DAVID GARRETT REEP,

Appellant.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR FRANKLIN COUNTY

The Honorable Craig J. Matheson, Judge

REPLY BRIEF OF APPELLANT

LENELL NUSSBAUM
Market Place Two, Suite 200
2001 Western Ave.
Seattle, WA 98121
(206) 728-0996

ROBERT J. THOMPSON
504 W. Margaret St.
Pasco, WA 99301
(509) 547-4011

Attorneys for Mr. Reep

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STATUTES AND OTHER AUTHORITIES

A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Appellant assigns error to Finding No. 11 to the extent it finds:

> [A]ll of the aforesaid persons being photographed were in a place where they would have a reasonable expectation of privacy. The residential backyards surrounded by six-foot stockade fencing were places where one may reasonably expect to be free from casual or hostile intrusion or surveillance within the meaning of RCW 9A.44.115(1)(c)(ii).

CP 38A-38B.[1]

2. Appellant assigns error to Finding No. 7:

> Detective Mayse re-contacted the Honorable Carolyn A. Brown by telephone and applied for another telephonic search warrant by reading from the script he had prepared (Exhibit "7"). Exhibit "7" accurately represents the information provided to Judge Brown by Detective Mayse. Judge Brown orally authorized a second search warrant.

CP 197.

B. STATEMENT OF THE CASE IN REPLY

1. Substantive Facts

David Reep was convicted of four counts of voyeurism for taking photographs of clothed people in neighbors' backyards next to his home. CP 50-55. The first yard (8211) has a wooden fence on the side adjoining the Reep property, and a chain link fence on the far side of the yard. The second yard (8217) has a chain link fence on both sides. Another wooden

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[1] The trial court entered three pages of Findings of Fact and Conclusions of Law on Bench Trial. Initially the superior court clerk sent only the first of the three pages of findings and conclusions. Pp. 2-3 are designated 38A-38B.

fence is located on the far side of the third backyard (8221) from the Reeps' home. CP 38-38B, 56.

The wooden fence is six feet high on the neighbor's side. The Reeps' driveway, however, is elevated above ground level. CP 57. Mr. Reep himself is 6'4" tall. The Reep home has an upper floor with windows overlooking the neighbors' backyards. Any person Mr. Reep's height, or even considerably shorter, can easily see over the wooden fence into the yards from the driveway, the garage, or the upstairs windows, the locations from which the photos were taken. CP 48.

There is nothing sexually explicit about the photographs. CP 50-55.

When the trial court denied all pretrial motions, Mr. Reep stipulated to certain facts, from which the court found him guilty. CP 47-59, 38.

2. Procedural Facts

The police responded to the Reep residence on June 11, 2004, because of an explosion and fire from a meth lab in the backyard.[2] Police sought and obtained a telephonic search warrant for the home. This first telephonic application was

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[2] Mr. Reep pleaded guilty to unlawful possession of a controlled substance with intent to deliver. CP 197. He has completed his sentence and drug treatment, and is leading a clean and sober life at this time. A psychological evaluation found him not to be a threat to the community. CP 40-46.

recorded and transcribed. Judge Brown authorized a warrant with the following language:

> I am requesting a search warrant for **the backyard area** of 8205 Sunset Lane **and** to enter and search **the bedroom of David Reep** located at the residence of 8205 Sunset Lane. ... [a]nd it's contents, all storage areas and containers located therein as may apply **and to seize the following items of evidence as well as** dominion papers, documents consistent with the manufacture of methamphetamine.

CP 151-53; Exs. 8-9.[3] No "following items of evidence" were mentioned. Nonetheless, the warrant that Det. Nelson signed on behalf of Judge Brown was a pre-printed page with the following much broader language:

> Now, therefore, you are hereby commanded ... to enter and search **the above-described premises and all buildings, outbuildings, rooms, cellars, or subcellars thereon/ the above described vehicle and it's contents**, all storage areas, all containers therein as may apply, and **to seize all the evidence and items described above**, as well as any papers, documents or other matter tending to establish the identity of persons exercising dominion and/or control over the premises or items seized pursuant to this warrant ... .

Ex. 8 at 3.[4]

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[3] For the Court's convenience and analysis, counsel attaches Exs. 6-9, the telephone script, transcript and warrants, in Appendix B.

[4] This language is found on the third page of the exhibit, although it is labeled "page 2."

While searching Mr. Reep's bedroom pursuant to this warrant, Det. Mayse[5] also searched Mr. Reep's computer. He found images that concerned him, although they had nothing to do with drugs.[6] He described them as obvious cut-outs applied to look sexually suggestive. He could tell they were not actual photographs of sexual activity.[7] He testified that he then sought and obtained a second telephonic search warrant to search the computer. RP 81-90.

Det. Mayse testified that he wrote out a script, he read the script to Judge Brown on the phone, and she authorized him

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[5] Although Mayse was a detective at the time of the search, he had been terminated from the Pasco Police Department by the time this case was heard. RP 75-78; CP 171-73. The court denied defense counsel's motion for discovery of this officer's personnel file to determine whether there was anything relevant to the defense, in particular that would go to his credibility as a witness. RP 2-33. Without even reviewing the file in camera, the court denied the motion, ruling that prior bad acts that are not convictions are not admissible. RP 23-24. He reiterated that ruling at the suppression motion. RP 75-78.

[6] The officer did not testify how he came across these images; he didn't mention any files had sexually suggestive names. Contrast: State v. Wible, 113 Wn. App. 18, 51 p.3d 830 (2002) (names of files supported conclusion they contained child pornography).

[7] In his script, he described what he saw as "photo's of young children with out their knowledge" and "pornographic pictures of young girls conducting sex acts that also appeared to be graphically simulated." In the room was a "collage of cut out pictures of young girl models, which included at list on naked picture of a young female" [sic]. Ex. 7 at 2. Det. Mayse said they looked like ads for Old Navy. RP 86. The photos alleged to be voyeuristic were not in the collage.

to sign a warrant on her behalf. The script included a request to search for evidence of "narcotics," listing with some specificity what he was seeking. RP 91-93; Ex. 7.

Again, the warrant the officer signed on behalf of Judge Brown does not track the script of what he requested. It says probable cause was found for evidence of "narcotics/child sex," namely:

> muratic acid, tulane, metal bowls, burners, glassware and other precursors consist with the production of meth; and any data storage devices to include a computer and its hardware, compact discs, floppy discs, portable storage units such as USB accessible devices, digital cameras, video cameras, photographs any documentation of criminal activity by the suspect and other evidence not listed that support the suspected criminal activity.

Ex. 6 at 1. The second page is the identical boilerplate of the first warrant. Ex. 6 at 2; Ex. 8 at 3.

Before the search, Det. Mayse realized there was no recording of his call to the judge. Nonetheless, rather than call the judge back and make a proper record, he proceeded to seize the computer. RP 93-95.

The photo images of the people in the backyards were found on the computer. CP 50-55.

Det. Mayse gave this testimony on August 5, 2005 -- more than one year after the search. RP 35, 72-97.

Judge Brown had no recollection of the call from Det. Mayse. CP 197 (Finding 10).

C. ARGUMENT IN REPLY

1. THE EVIDENCE IN THIS CASE IS LEGALLY INSUFFICIENT TO SUPPORT A FINDING THAT THE PHOTOGRAPHS WERE TAKEN OF PEOPLE IN A "PLACE WHERE HE OR SHE WOULD HAVE A REASONABLE EXPECTATION OF PRIVACY."

RCW 9A.44.115. Voyeurism
(1) As used in this section:
...
(c) **"Place where he or she would have a reasonable expectation of privacy" means:**
(i) A place where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed or filmed by another; or
(ii) **A place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance;**
...
(2) A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly **views, photographs**, or films:
(a) **Another person without that person's knowledge and consent while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy;** ... .

(Quoted more fully in Appendix C.)

a. Expectation of Privacy and Voyeurism

In State v. Glas, 147 Wn.2d 410, 54 P.3d 147 (2002), two defendants took "up-skirt" photographs of women in public places, capturing images of their underclothing. The Washington Supreme Court reversed the convictions,[8] finding the voyeurism statute as it then existed did not encompass such activity if it occurred in a public place.

The Glas Court considered both statutory definitions of "a place where a person would have a reasonable expectation of

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[8] Curiously, the state relies on the Court of Appeals opinion that was reversed. Resp. Br. at 42.

privacy." The first was not challenged, and fairly easy to define as

> standard "peeping tom" locations ... . This would include a person's bedroom, bathroom, a dressing room or a tanning salon. These locations are all places where a person is expected to, and frequently does, disrobe. ...
>
> The second subsection, "[a] place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance," applies to **locations where a person may not normally disrobe, but if he or she did, he or she would expect a certain level of privacy.** These locations could include **any room in a person's domicile** other than the bedroom or bathroom, such as the kitchen, living room or laundry room; **a locker room** where someone may undress in front of others, but not expect to have his or her picture taken; or **an enclosed office** where someone may close the door to breast-feed or change for a bike ride commute home. It would also apply to places where someone may not normally disrobe, but would nonetheless expect another not to intrude, either casually or hostilely. An example would include **a private suite or office.** A person would reasonably expect that another individual would not place a camera under his or her desk to view or film his or her genital region. Thus, this second subsection is necessary and not superfluous because **it expands the locations where a person would possess a reasonable expectation of privacy beyond those of a traditional "peeping tom," but not so far as to include public locations.**

Id. at 416 (emphases added).[9]

A back yard clearly is not a traditional "peeping tom" location. But it also is not where a person who chose to disrobe would expect "a certain level of privacy" when the

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[9] These distinctions show the flaw in the state's argument that "if it was not possible to see into an area, it would not be possible to view or photograph the person located there." Resp. Br. at 48. Glas contemplated people leaving cameras or other "devices designed or intended to improve visual acuity" in such places to record even what people could not otherwise see.

yard is exposed to neighbors. The Supreme Court's examples from Glas conclusively settle this issue: a back yard exposed through a chain link fence in one direction and to a neighbor's driveway, garage, and upper-story windows in the other, is vastly different from the examples Glas lists, all of which are enclosed rooms.

In State v. Stevenson, 128 Wn. App. 179, 114 P.3d 699 (2005), the defendant discovered his 22-year-old daughter sunbathing in the backyard of the home they shared, wearing only her underwear. She covered herself when she saw him. He went into the house and sat in a room where he could view her from the window. He masturbated while he watched her. The next morning, he parted the blinds covering a window in the bathroom door so he could watch her shower. Id. at 183-84.

Mr. Stevenson was charged and convicted of voyeurism. It is significant, however, that he was only charged for the incident of watching his daughter in the shower, through the blinds covering the bathroom window. Id. at 185 n.4. The state did not charge him for watching her through a window while she was in the backyard, although there was no question he "viewed" her "without her knowledge and consent" "for purposes of sexual gratification." Under Glas, the bathroom clearly falls within the first statutory definition. But it also falls within the concept of the second, broader definition, since it is still a room in the house. In

contrast, no one suggested the daughter had the same expectation of privacy while in the backyard.

b. Expectation of Privacy in Other Contexts

i. Relevance

The state claims that because the statute defines "reasonable expectation of privacy," cases involving that concept in other contexts are irrelevant. It then somehow argues:

> Persons growing marijuana plants in a fenced backyard where the plants could be seen from a neighbor's second floor window could expect their neighbors to report the matter to the police. However, those same persons would reasonably expect their neighbors to respect their privacy and **not subject them to hostile surveillance**, even if the neighbors may occasionally take a **casual view** of the backyard.

Resp. Br. at 39 (emphases added).[10] The Supreme Court explicitly rejected this view in Glas:

> [T]he statute does not require that the viewing or filming be intrusive or hostile--this relates to the expectation of privacy. ...
>
> Additionally, both the trial court and the Court of Appeals seem to overlook the legislature's reference to a "casual" intrusion and instead focus on a "hostile" intrusion, a distinction apparently necessary to apply the statute to a public place.
>
> ... In light of the statutory definition of "view," **the lower courts' interpretation of the statute would sweep constitutionally protected conduct within the statute's penumbra because it could encompass simply looking at someone appreciatively or desirously in a public place**, such as a restaurant or a bar.

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[10] Quare whether the state would consider it "hostile surveillance" if a neighbor watched while the person in the backyard smoked marijuana, and called the police; or offered to let the police have a view from their upper-story window.

> Additionally, if the statute is read as the trial court and the Court of Appeals interpret, then **the statute would criminalize photographing a person on a public street, regardless of the pose, if the purpose of the photograph was to gratify or arouse sexual desire. These acts provide but a few examples of the potential overbreadth of RCW 9A.44.115.**

Glas, 147 Wn.2d at 420-21 (emphases added).

The statutory definition itself turns on what a person may "reasonably expect." RCW 9A.44.115(c)(ii). As the Court explained in Glas:

> Considering that casual intrusions occur frequently when a person ventures out in public, it is illogical that this subsection would apply to public places. Casual surveillance frequently occurs in public. Therefore, public places could not logically constitute locations where a person could reasonably expect to be safe from casual or hostile intrusion or surveillance.

Glas, 147 Wn.2d at 415-16.

As the Court acknowledged in Glas, what a person may "reasonably expect" turns on how people are known to behave. The same standard is used in other legal contexts.

ii. Open View Principles

A person's "reasonable expectation of privacy" defines the lawfulness of a warrantless search. "[A] search occurs under the Fourth Amendment if the government intrudes upon a reasonable expectation of privacy." State v. Bobic, 140 Wn.2d 250, 258, 996 P.2d 610 (2000); Katz v. United States, 389 U.S. 347, 351-52, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). But

> Washington's constitution provides that "[n]o person shall be disturbed in his private affairs, ... without authority of law." Const. art. I, § 7. ... Thus,

> Washington's "private affairs inquiry" is broader than the Fourth Amendment's "reasonable expectation of privacy inquiry."

Bobic, 140 Wn.2d at 258. But even this broader state inquiry would not support a reasonable expectation of privacy in an exposed back yard.

> [W]hat is voluntarily exposed to the general public and observable without the use of enhancement devices from an unprotected area is not considered part of a person's private affairs.

State v. Jackson, 150 Wn.2d 251, 260, 76 P.3d 217 (2003).[11]

A person's greatest expectation of privacy is within one's home. Nonetheless, the Washington Supreme Court has held "there is no reasonable expectation of privacy in what can be seen through uncurtained windows," even in one's home.[12]

> An officer may act as any reasonably respectful citizen. Such a person can be expected to stand virtually anywhere on a porch like the one in this case while waiting for a response from the door, and to look inside while waiting. A resident who leaves unobstructed a window immediately to the left of the front entrance should expect that reasonably respectful persons will look in, even if just out of curiosity.

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[11] Nonetheless, the state must obtain a warrant to track a defendant's movements in public by attaching a GPS device to his car. Id.

[12] State v. Rose, 128 Wn.2d 388, 394, 909 P.2d 280 (1996) (marijuana seen through uncovered window while standing on front porch, where officer had right to be); State v. Manly, 85 Wn.2d 120, 124, 530 P.2d 306 (view enhanced by binoculars), cert. denied, 423 U.S. 855 (1975); State v. Drumhiller, 36 Wn. App. 592, 595-96, 675 P.2d 631, review denied, 101 Wn.2d 1012 (1984) (view through unobstructed window into house while lawfully on walkway to front door).

State v. Rose, 128 Wn.2d 388, 396, 909 P.2d 280 (1996).

> ... Rose left marijuana in plain view through an unobstructed window, and the flashlight used by the officer was no more invasive than observations with natural eyesight during daylight would have been. ... While there is no doubt that a person's home is a highly private place, **that which is left exposed to anyone standing on a front porch impliedly open to the public has no privacy interest in the item exposed.**

Rose, 128 Wn.2d at 400-01 (emphasis added).

In fact, the Washington Supreme Court unanimously approved a police officer's "viewing" into a person's storage unit, without that person's knowledge or consent, from a hole in the wall of an adjacent storage unit. The Court held the items in the locked storage unit, whose walls went from the floor to the ceiling, were nonetheless in "open view," due to the hole.

> Under the open view doctrine, "when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a 'search'. ... Here, the detective was lawfully inside the adjoining unit because the manager had given him permission to enter. Furthermore, it appears from the record that the detective's observations were made without extraordinary or invasive means and could be seen by anyone renting the unit.

State v. Bobic, supra, 140 Wn.2d at 259, citing State v. Rose, supra.[13]

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[13] See also: State v. Myrick, 102 Wn.2d 506, 688 P.2d 151 (1984) (no reasonable expectation of privacy from aerial overflights on property, despite fences, no trespassing signs, and heavy woods surrounding area); State v. Cockrell, 102 Wn.2d 561, 689 P.2d 32 (1984) (same).

iii. Tortious Invasion of Privacy

A similar standard is applied in tort actions for invasion of privacy. In Mark v. Seattle Times, 96 Wn.2d 473, 635 P.2d 1081 (1981), the plaintiff was inside his pharmacy after closing. The door was locked. A television cameraman photographed the plaintiff and others by placing his camera against the window while standing on a neighbor's driveway.

> [T]he thing into which there is intrusion or prying must be, and be entitled to be, private. ... On the public street, or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record ....

Mark, 96 Wn.2d at 497.

> Even if Mark's version were true (that the [driveway] was private), however, the place from which the film was shot was open to the public and thus any passerby could have viewed the scene recorded by the camera.

Mark, 96 Wn.2d at 499.

In this case, Mr. Reep was in his own home, on his own driveway, and in his own garage when he took the photographs. He was where he was legally entitled to be. His observations "were made without extraordinary or invasive means and could be seen by anyone" else who might have been there. Anyone visiting would be able to view the same activities in the neighbor's backyards. It is not reasonable to expect that people will not watch, or photograph, what occurs in such an exposed setting.

For these reasons, the convictions should be reversed and dismissed. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); U.S. Constitution, amend. 14; Const., art I, § 3.

2. THE TRIAL COURT'S INTERPRETATION OF THE STATUTE WOULD RENDER IT UNCONSTITUTION-ALLY VAGUE AND OVERBROAD.

Mr. Reep does not claim "a fundamental right to engage in voyeurism." Resp. Br. at 40. The Glas Court already rejected the trial court's and the state's interpretation of this statute, because adopting it would make the statute unconstitution-ally void and overbroad.

A third party may challenge a law as overbroad if the law in question chills or burdens constitutionally protected conduct. Courts permit such a challenge because of the importance of fundamental constitutional rights. Thus a statute may be invalidated for overbreadth where it would be unconstitutional as applied to others, even if not as applied to the litigant. Glas, supra, 147 Wn.2d at 419.

> A law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities. The First Amendment overbreadth doctrine may invalidate a law on its face only if the law is 'substantially overbroad.' In determining overbreadth, a 'court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.' Criminal statutes require particular scrutiny and may be facially invalid if they 'make unlawful a substantial amount of constitutionally protected conduct ... even if they also have legitimate application.

Id., quoting State v. Webster, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990), and City of Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989).

Photography is a medium of speech, protected by the First Amendment. See Stevenson, supra, 128 Wn. App. at 189 n.7. Many famous artists create their art from photographs of people in open-view areas. Certainly any celebrity realizes that sunbathing in a backyard within view of the neighbor's upper stories or garage will result in "appreciative" paparazzi clicking photographs from those vantages. The trial court's interpretation clearly would criminalize such constitutionally protected activity.

The statute by its terms forbids even the "viewing" of a person when they are in a place in which they have a reasonable expectation of privacy. It is ludicrous to suggest that somehow people on their own property, in their own home or garage, are required to avert their eyes when their neighbors are in their exposed backyard, or face prosecution for a crime.

The Glas Court rescued the statute by placing

> a sufficiently limiting construction on a standardless sweep of legislation. ... We need merely interpret the plain language of the statute as written to render it constitutional.

Id. at 421.

The Court held that the statute could not be interpreted to criminalize a person's thoughts.

> Such an interpretation could ostensibly criminalize lustful thoughts since the statute covers viewing a person, defined as the "intentional looking upon of another person for more than a brief period of time, in other than a casual or cursory manner," for the purpose of arousing or gratifying sexual desire. ...
>
> If the statute is read as written, then casual or hostile intrusion refers to the place where the intrusion occurs, not the intruder's mental intent. Accordingly, the statute would not be vague because it would encompass a place where a person would not expect either a casual or hostile intrusion, including a living room in a private domicile or an enclosed office, but not a public place.

Id. at 422.

This court should apply the Supreme Court's interpretation of this statute, the only one that makes it constitutional, and reverse and dismiss these convictions.

3. DETECTIVE MAYSE'S SEARCH OF THE COMPUTER WAS UNCONSTITUTIONAL.

a. There is No Valid Warrant Because There is No Independent Record of the Affidavit or the Court's Authorization.

Det. Mayse testified that he phoned Judge Brown for a second warrant after he began searching Mr. Reep's computer.[14]

This issue is controlled by State v. Myers, 117 Wn.2d 332, 815 P.2d 761 (1991). The Supreme Court there reversed a conviction based on a telephonic warrant with no recording.

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[14] This procedure is governed by CrR 2.3(c). The text of this rule is contained in Appendix A to this Reply Brief.

An officer testified he obtained a warrant by telephone. The officer learned there was no recording the day after the search. He wrote down what he recalled of the preceding day's events.

The judge there, as here, had no independent recollection of the events -- although there, unlike here, at least the judge recalled receiving the call for a warrant and authorizing a warrant. However, he recalled no details, including the name of the officer or defendant or the details upon which he determined that probable cause existed. Myers, 117 Wn.2d at 334-36.

As here, the trial court concluded that the testimony of the officer at the suppression hearing "constituted a record of the probable cause determination." The Supreme Court flatly rejected this concept.

> [M]agistrates and persons seeking telephonic warrants must adhere to the rules governing issuance of these warrants because compliance: (1) facilitates judicial review, ... (2) compels respect for, and observance of, the constitutional guaranties of the Fourth Amendment, ... (3) preserves judicial integrity, ... and (4) removes any hint of misconduct or bad faith by the prosecutor or the police.

Myers, 117 Wn.2d at 341-42 (citations omitted).

> If a magistrate completely fails to record statements that support a telephonic warrant, or take those statements under oath, then this gross procedural deviation generally renders the warrant invalid.

Id., 117 Wn.2d at 342-43.

Parties may reconstruct a recording, however, if the omission in the contemporaneous recording does not impair the reviewing court's ability to ascertain what the magistrate considered when he issued the warrant. **The court may allow the parties to reconstruct an entire sworn statement only if detailed and specific evidence of a disinterested person, like the magistrate or court clerk, corroborates the reconstruction.**

In this case, failure to record the entire conversation based upon which the magistrate authorized the warrant is a gross deviation from CrR 2.3. **The magistrate did not take notes of the conversation and does not clearly recall the grounds upon which he concluded that probable cause existed to issue the warrant. It is impossible to accurately review what the judge considered or found when he issued the warrant to search Myers' house and premises.** The only evidence of the telephonic affidavit is the police officers' testimony, offered 4 months after the event, and Officer Hiles' report, made after the search occurred and after the tape that could establish the accuracy of the report was lost. This is not sufficient. We do not presume that any party in this case abused the procedures that govern telephonic warrants, but:

> [W]e cannot be unmindful of the possibility that an overzealous law enforcement officer may, subconsciously, be tempted[15] to rectify any deficiency in his testimony before the issuing judge by post-search repair.

Myers, 117 Wn.2d at 343-44 (emphases added).

As in Myers, here the officer had no recording of the call to the magistrate. The state argues, and the trial court found, that the officer's testimony that he wrote out his affidavit before making the call, and read it verbatim to the judge, is a sufficient record for appellate review. But the Myers Court rejected the officer's report of what he told the

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[15] Such a "temptation" might explain why Det. Mayse asked to search for evidence of methamphetamine production in this second "warrant," when he testified the first warrant already allowed him to search for it. Exs. 6, 7.

magistrate not because it was inaccurate, but because **no "disinterested person" could confirm it was accurate.** Here the magistrate could not even confirm such a call was made or any warrant authorized.

The situation here is even more egregious because the officer knew before the search that he had no record of the phone call. Yet, rather than phone the judge again and repeat the process for a valid recording, he proceeded with the search. RP 93-94. There were no exigent circumstances requiring such a rush: another officer was already on the premises, the defendant was in jail, and his parents were offering no interference whatsoever.

This fact also requires application of Myers instead of State v. Raflik, 248 Wis.2d 593, 636 N.W.2d 690 (2001), relied on by the state. Resp. Br. at 24-25. In Raflik, the officer immediately contacted the magistrate when he learned there was no recording. They reconstructed the phone call and warrant authorization **with the assistance of the magistrate**, a disinterested party, within hours of the phone call occurring.

b. Even Detective Mayse's Version of Events Does Not Support a Finding of Probable Cause to Seize the Constitutionally Protected Images From the Computer.

Even if one accepts the uncorroborated script by Det. Mayse as an accurate record, Ex. 7, it does not support a finding of probable cause to search the computer. The officer

clearly was seeking to search through materials that are constitutionally protected by the First Amendment. First Amendment protections are not limited to political and religious materials, as suggested by the state. Resp. Br. at 5. What he had seen was insufficient to support probable cause, and his language of what he was looking for was constitutionally overbroad.

This issue is controlled by State v. Perrone, 119 Wn.2d 538, 834 P.2d 611 (1992). In Perrone, the Supreme Court reversed convictions for dealing in and possessing depictions of minors engaged in sexually explicit conduct. It found the search warrant for the defendant's residence lacked probable cause and was overly broad. The warrant authorized seizure of the following items:

> Child or adult pornography; photographs, movies, slides, video tapes, magazines or drawings of children or adults engaged in sexual activities or sexually suggestive poses; correspondence with other persons interested in child pornography, phone books, phone registers, correspondence or papers with names, addresses, phone numbers which tend to identify any juvenile; camera equipment, video equipment, sexual paraphernalia; records of safe deposit boxes, storage facilities; computer hardware and software, used to store mailing list information or other information on juveniles; papers of dominion and control establishing the identity of the person in control of the premise; any correspondence or papers which tend to identify other pedophiles.

Perrone, 119 Wn.2d at 543.

> Where a search warrant authorizing a search for materials protected by the First Amendment is concerned, the degree of particularity demanded is greater than in the case

> where the materials sought are not protected by the First Amendment.

Id., 119 Wn.2d at 547. The Court explained how the affidavit also must be particular in order for there to be a legitimate finding of probable cause. Vague or overbroad statements of what is found in such materials will not support a warrant.

While "child pornography" is not constitutionally protected,

> the nature of the harm to be combated requires that the state offense be limited to works that *visually* depict **sexual conduct** by **children below a specified age.** The category of "sexual conduct" proscribed must also be suitably limited and described.

New York v. Ferber, 458 U.S. 747, 764, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982) (Court's italics, bold added).

Pornographic drawings, even of children, are constitutionally protected. Perrone, 119 Wn.2d at 551-52, Ferber at 764-65. Language referring to children in "sexually suggestive poses" is far too broad to satisfy the Fourth Amendment.

> The definition of sexually explicit conduct in RCW 9.68A.011 is broad. However, **a depiction of a child under 16 years of age who is fully clothed, without exhibition of genitals or any of the other conduct described in the statute, could be sexually suggestive** [but still constitutionally protected].

Perrone, 119 Wn.2d at 552 (emphasis added). The reason "it may have been impossible ... to articulate whether Mr. Reep was stalking the children, engaging in voyeurism, performing sexual acts with children, or participating in child

pornography," Resp. Br. at 16, is that what Det. Mayse found did not support any of those conclusions.

Possession of obscenity (not child pornography) and adult pornography in the home also is protected.

> [W]hile the [Ferber] Court held that child pornography is not protected by the First Amendment, that is not to say that any search warrant having as its object the seizure of child pornography escapes the mandate that the particularity requirement be followed with "scrupulous exactitude". Books, films, and the like are *presumptively* protected by the First Amendment where their content is the basis for seizure.

Perrone, 119 Wn.2d at 550 (Court's emphasis).

The Perrone Court found instructive the distinction between two warrants:

> [A]ny other books, magazines, photographs, negatives, or films depicting obscene, lewd, lascivious or indecent sexual conduct

was too general;[16] while

> [b]ooks, magazines, photographs, negatives, films and video tapes depicting minors (that is, persons under the age of 16) engaged in sexually explicit conduct

was sufficiently particular.[17] Perrone, 119 Wn.2d at 562.

"Photos of young children without their knowledge" are not illegal. CP 50-55. "Graphically simulated" sexual images are not illegal, and cut out pictures from newspapers,

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[16] United States v. Hale, 784 F.2d 1465, 1468 (9th Cir.), cert. denied, 479 U.S. 829 (1986).

[17] United States v. Hurt, 795 F.2d 765, 772 (9th Cir. 1986), modified, 808 F.2d 707 (9th Cir.), cert. denied, 484 U.S. 816 (1987).

magazines, or catalogue ads are not illegal, even if "young girl models" in them are naked. Ex. 7 at 2; Exs. 4, 5.

This "evidence" was material protected by the First Amendment. There was no probable cause to search further through this man's private materials. The language in the warrant itself provided no greater particularity. It was an unconstitutional search. U.S. Const., Amends. 1, 4; Const., art. 1, §§ 5, 7.

4. DETECTIVE NELSON'S WARRANT DID NOT PERMIT A SEARCH OF THE COMPUTER.

a. <u>The Warrant was Invalid Because the Magistrate did not Authorize the Warrant's Language.</u>

There are two determinations a magistrate must make in authorizing a warrant: (1) Does the affidavit establish probable cause, and (2) Does the warrant adequately describe only the items for which there is probable cause?

> If the court finds that probable cause for the issuance of a warrant exists, it shall issue a warrant or direct an individual whom it authorizes for such purpose to affix the court's signature to a warrant identifying the property or person and naming or describing the person, place or thing to be searched.

CrR 2.3(e).

Det. Nelson's telephonic record of his request for a warrant did not include reading to the magistrate the language of the warrant itself. Ex. 9. Thus the magistrate did not approve the actual warrant. It cannot be a valid warrant

under these circumstances. Myers, supra; U.S. Const., Amend. 4; Const., art. I, § 7.

b. Detective Nelson's Warrant Did Not Authorize Search of the Computer.

> General warrants, of course, are prohibited by the Fourth Amendment. "[T]he problem [posed by the general warrant] is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings.... [The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized."

State v. Perrone, supra, 119 Wn.2d at 545.

The particularity requirement serves at least two additional purposes. It limits the discretion in the executing officer's determination of what to seize.

> A particular warrant also "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search."

Groh v. Ramirez, 540 U.S. 551, 124 S. Ct. 1284, 1292, 157 L. Ed. 2d 1068 (2004) (holding itemization in affidavit will not cure vagueness in warrant).

The use of a generic term or general description is constitutionally acceptable only when a more particular description of the items to be seized is not available at the time the warrant issues. State v. Perrone, supra, 119 Wn.2d at 547. Thus in United States v. Wong, 334 F.3d 831, 837-38 (9th Cir. 2003), the warrant specified "data as it relates to this case" from computers, which at least authorized some search of computers. Resp. Br. at 5.

This case presents overwhelming proof that a more particular description of the items to be seized was available. The police knew there was a computer in the bedroom before Det. Nelson sought the warrant. If they wanted to search the computer, they knew how to draft a warrant permitting such a search. Det. Mayse presented such language to the court. He also was able to articulate with specificity what evidence of meth manufacture he sought. Exs. 6-7. Det. Nelson didn't even use the word "computer." Exs. 8-9.

D. CONCLUSION

> When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.

State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999); State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986); Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Any one of the problems described above requires suppression of the images recovered from Mr. Reep's computer, and a dismissal of these charges. State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993).

DATED this 17th day of January, 2007.

LENELL NUSSBAUM, WSBA No. 11140
Attorney for Mr. Reep

APPENDIX A

(c) Issuance and Contents. A search warrant may be issued only if the court determines there is probable cause for the issuance of a warrant. There must be an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant. The sworn testimony may be an electronically recorded telephonic statement. The recording or a duplication of the recording shall be a part of the court record and shall be transcribed if requested by a party if there is a challenge to the validity of the warrant or if ordered by the court. The evidence in support of the finding of probable cause shall be preserved and shall be subject to constitutional limitations for such determinations and may be hearsay in whole or in part. If the court finds that probable cause for the issuance of a warrant exists, it shall issue a warrant or direct an individual whom it authorizes for such purpose to affix the court's signature to a warrant identifying the property or person and naming or describing the person, place or thing to be searched. The court shall record a summary of any additional evidence on which it relies. ...

CrR 2.3(c).

APPENDIX B

Copies of Exhibits

Ex. 6 - Search Warrant

Ex. 7 - Script Prepared by Mayse

Ex. 8 - Search Warrant drafted by Det. Nelson

Ex. 9 - Telephonic Search Warrant Application

(TELEPHONIC SEARCH WARRANT)

In the Superior Court before the Honorable Judge BROWN County, State of Washington.

STATE OF WASHINGTON, Plaintiff
vs. DAVID REED Defendant, and
[illegible] SUNSET LANE
[illegible]
[illegible] CT.
UNIT # 25

SEARCH WARRANT

04-19553

ORIGINAL

County of
State of Washington) ss

In the name of the State of Washington, to Sheriff LATHAM of FRANKLIN County and his deputies, or to police officers of the City of Pasco, or to civil officers of the State of Washington duly authorized to enforce:

Whereas sworn complaint has been made to and filed with the undersigned Judge BROWN by JASON MAYER of the Pasco Police Department stating under oath that he has probable cause to believe that certain evidence to the crime of: NARCOTICS / CHILD SEX, namely:

MURATIC ACID, TULANE, METAL BOWLS, BURNERS, GLASSWARE AND OTHER PRECURSORS CONSIST WITH THE PRODUCTION OF METH; AND ANY DATA STORAGE DEVICES TO INCLUDE A COMPUTER AND ITS HARDWARE, COMPACT DISCS, FLOPPY DISCS, PORTABLE STORAGE UNITS SUCH AS USB ACCESSIBLE DEVICES, DIGITAL CAMERAS, VIDEO CAMERAS, PHOTOGRAPHS AND DOCUMENTATION OF CRIMINAL ACTIVITY, WHO SUSPECT AND OTHER EVIDENCE NOT LISTED THAT SUPPORT THE SUSPECTED CRIMINAL ACTIVITY.

within County:

ORIGINAL

Now therefore, you are hereby commanded in the name of the State of Washington, with all necessary and proper assistance, with such force as may be necessary, to enter and search the above-described premises and all buildings, outbuildings, rooms, cellars, or subcellars thereon/ the above described vehicle and it's contents, all storage areas, all containers therein as may apply, and to seize all the evidence and items described above, as well as any papers, documents or other matter tending to establish the identity of persons exercising dominion and/or control over the premises or items seized pursuant to this warrant, and to safely keep the same and to make a return of this warrant within 10 days from the date hereof, with a particular statement of all items seized and the name of the person(s) in whose possession the same were found, and if no such items are located the return shall so state. A copy of this warrant shall be served upon the person(s) found in possession of the items seized, as well as a copy of the inventory listing all items seized, and if no such person is present at the time of the execution of this warrant, the copies of the warrant and the inventory shall be left in a conspicuous place upon the premises/within the vehicle. Herein fail not.

Given upon my hand this 13 day of JUNE 2004

Judge Brown

Honorable Judge

By Jason D. Mayer

ORIGINAL

Your Honor, my name is DET. MAYSE of the Pasco Police Department and Im speaking with Judge BROWN . Your Honor, do I have your permission to record this statement and conversation?

Today's date is June 13, 2004, and the time is 1108 . Judge BROWN Will you swear me in? Judge BROWN , your affiant, Detective Jason Mayse, being a duly commissioned Police officer for the Pasco Police Department since March of 1996. During my tenure as a police officer I have received training in the investigation of criminal matters, including the investigation of SEX CRIMES.

Your Honor, I have received the following information, THAT:

On June 11, 2004 I responded to 8205 Sunset lane, located within the City of Pasco, because of neighbor reports of a loud explosion. When I arrived I observed smoke coming from the far corner of the property. Sitting in the middle of charred out remains was suspect Reep. His hands had been apparently burned from either putting out the fire, or from being present during the explosion.

After viewing the area, myself and other officers suspected that an active meth lab had exploded. I observed what looked like a burner that had been connected to a propane bottle, tubing, glass jars, and the smell of chemicals similar to Tulane, and other precursor chemicals use to manufacture methamphetamine. It was determined at that point that the meth lab clean up crew would be called out to asses the scene and do the clean up. The area was secured until the next day when the team could arrive.

I made contact with the homeowner, who advised their son, David Reep, had recently been involved in counseling for a meth addicition, and had indicated in the past that he knew how to manufacture meth. They also had concerns that maybe he had some other chemicals in his room, which he uses to live in within their home. I did a cursory walk through of the room and didn't immediately noticed any suspicious smells or chemicals; however, I did tell them that we would be adding the room in the clean up search warrant.

ORIGINAL

On June 12, 2004, I arrived along with the clean up crew, and conducted a search of the room. During the search of the room, which was primary focused on meth recipes, and or chemicals, which could have been stored on the suspect's computer or had written, I noticed pictures on his computers of what appeared to be illicit photo's of young children with out their knowledge. There also appeared to be pornographic pictures of young girls conducting sex acts that also appeared to be graphically simulated. At that point I shut the computer down for later forensics.

I also noticed that the suspect had made collage of cut out pictures of young girl models, which included at list on naked picture of a young female. I decided at this point that I would seal off the room, and apply for a second search warrant covering evidence for the crime of child pornography, and/ or stalking.

I was also informed by the suspect's parents that the suspect Reep, had a storage unit nearby and that he would frequent the unit often. I will also be included the storage unit in this warrant.

Therefore your honor I am requesting a search warrant to enter and search the residence and/or Vehicle located at:

8205 Susnset late, a single family residence, with a brick structure, specifically suspects Reeps, bedroom which is located on the lower portion of the house on the Northeast corner.

And the storage unit:

Located at 6217 W. Court St. DBA Express Storage, unit # 355

ORIGINAL

For the evidence of the crime of: Narcotics, which would include Muratic Acid, Tulane. Large Metal bowl of a bi-layer chemical, propane burners, glassware, and other precursors consist with the production of meth; AND any data storage devices to include a computer and its hardware, compact discs, floppy discs, portable storage units such as USB accessible devices, digital cameras, video cameras, photographs, any documentation of criminal activity by the suspect and any other evidence not listed that support the suspect criminal activity.

And its contents, all storage areas, all containers therein as may apply, and to seize the following items of evidence, as well as any papers, documents or other matter tending to establish the identity of person exercising dominion and/or control over the premises or items seized pursuant to this warrant, and to safely keep the same and to make a return of this warrant with a particular statement of all items seized, and if no such items are located the return shall so state. A copy of this warrant shall be served upon the person or persons found in possession of the items seized, as wall as a copy of the inventory listing all items seized, and if no such person is present at the time of the execution of this warrant, the copies of the warrant and the inventory shall be left in a common place upon the premises and/or within the vehicle.

Herein fail not Judge BROWN **, do I have permission to sign your name to this search warrant? Thank you your honor, the time is now** 1117 **.** YES YOU DO

(TELEPHONIC SEARCH WARRANT) ORIGINAL

In the Superior Court, County, State of Washington.
before the Honorable Judge Brown

STATE OF WASHINGTON, Plaintiff
vs.
REED, DAVID G. Defendant, and
7-14-59

SEARCH WARRANT

04-19553

County of
State of Washington) ss

In the name of the State of Washington, to Sheriff of County and his deputies, or to police officers of the City of Pasco, or to civil officers of the State of Washington duly authorized to enforce:

Whereas sworn complaint has been made to and filed with the undersigned Judge Brown by DET. M NELSON of the Pasco Police Department stating under oath that he has probable cause to believe that certain evidence to the crime of: UNLAWFUL MANU. OF A CONTROLLED SUB., namely:

On 6-11-04 at 2355 hrs. Ofc. T. Miller, and other officers from the Pasco Police Dept and Deputy Da Gaida of the F.C.S.O. Were dispatched to the Residence of 8205 Sunset Lane on the report of a fire either there or near there. Ofc. Miller arrived and upon looking over a back yard fence at 8205 Sunset Lane He observed a male inside this fenced area trying to put out the fire which was inside this fenced area. Ofc. Miller also noticed a strong chemical smell at this time. Ofc Miller observed a single Burner Coleman Stove and Mason Jars in the Proximity of the Fire. Officers and Deputy Gaida Were let into the Back yard by the Homeowner Irwin Reed. MR. Reed Irwin

within County:

TELEPHONIC SEARCH WARRANT ORIGINAL

In the Superior Court County, State of Washington.
before the Honorable Judge _____

STATE OF WASHINGTON, Plaintiff
vs.
_____ Defendant, and

SEARCH WARRANT

County of)
State of Washington) ss

In the name of the State of Washington, to Sheriff of County and his deputies, or to police officers of the City of Pasco, or to civil officers of the State of Washington duly authorized to enforce:

Whereas sworn complaint has been made to and filed with the undersigned Judge _____ by _____ of the Pasco Police Department stating under oath that he has probable cause to believe that certain evidence to the crime of: _____, namely:

Da the actual Homeowner, Officer Miller and Firemen on the scene the Discovered that Due to the nature of items found at the fire, (i.e. JARS, Chemicals consisting of ONS of Solvent AND Apparatus consistent w/ the MANUFACTURE of meth) that this fire was caused by Methamphetamine manufacture. It appeared to Off. Miller and Deputy Gaydo that the scene Consisted of an Illicit operation consisting of a sufficient combination of Chemicals and apparatus that either had been used or could be used in the manufacture of meth. David Reep had Chemical Burns on his hands and was in the process of putting out the fire. His Parents, Mr & Mrs. Irwin Reep also made Statements to officers that they believe there could Be additional items consistent w/ the manufacture of meth in David Reeps Bedroom. Located DOWNSTAIRS AT 8205 Sunset CN.

within FRANKLIN County:

ORIGINAL

Now therefore, you are hereby commanded in the name of the State of Washington, with all necessary and proper assistance, with such force as may be necessary, to enter and search the above-described premises and all buildings, outbuildings, rooms, cellars, or subcellars thereon/ the above described vehicle and it's contents, all storage areas, all containers therein as may apply, and to seize all the evidence and items described above, as well as any papers, documents or other matter tending to establish the identity of persons exercising dominion and/or control over the premises or items seized pursuant to this warrant, and to safely keep the same and to make a return of this warrant within 10 days from the date hereof, with a particular statement of all items seized and the same of the person(s) in whose possession the same were found, and if no such items are located the return shall so state. A copy of this warrant shall be served upon the person(s) found in possession of the items seized, as well as a copy of the inventory listing all items seized, and if no such person is present at the time of the execution of this warrant, the copies of the warrant and the inventory shall be left in a conspicuous place upon the premises/within the vehicle. Herein fail not.

Given upon my hand this 12th day of June, 20 04

Judge Carolyn Brown
Honorable Judge

ORIGINAL

Telephonic Search Warrant
Narcotics Case #04-19553
Detective Mike Nelson & Judge Carolyn Brown

04-50

FILED
FRANKLIN CO CLERK
2004 JUN 14 A 10:35
MICHAEL J. KILLIAN
BY DEPUTY

Nelson: Okay, Your Honor, my name is Detective Mike Nelson of the Pasco Police Department and I am speaking with Judge Carolyn Brown. Your Honor, do I have your permission to record this statement and conversation?

Judge Brown: Yes, you do.

Nelson: Thank you. Uh, today's date is June 12, 2004 and the time is now 0810 hours. Uh, Judge Brown, will you swear me in?

Judge Brown: Yes. Do you swear or affirm the testimony you are about to give will be the truth, the whole truth, nothing but the truth so help you God?

Nelson: I do, Your Honor.

Judge Brown: Please go ahead.

Nelson: Okay. Uh, Judge Brown, Your Affiant Detective Mike Nelson, being a duly commissioned police officer for the Pasco Police Department has been employed for approximately 5 years. During Your Affiant's tenure as a police officer, Affiant has received training in the investigation of criminal matters including the investigation of Unlawful Manufacture of Methamphetamine. Um, okay, on June 11, 2004 at approximately 2355 hours Officer Jason Miller and other officers of the Pasco Police Department and Deputy Dan Gayda of the Franklin County Sheriffs Office were dispatched to a residence of 8205 Sunset Lane on the report of a fire either there or near there. Officer Miller arrived shortly thereafter and upon looking over a backyard fence at 8205 Sunset Lane he observed a male inside this fenced area trying to put out a fire which was inside this fenced backyard area. Officer Miller also noticed there was a strong chemical smell at that time. Officer Miller observed a single burner Coleman stove and mason jars in close proximity of the fire. Officers and Deputy Dan Gayda were then let into the backyard gate by the homeowner, Mr. Ervin Reep, spelling on that is REEP. Uh, Mr. Reep is the actual homeowner. Officer Miller and firemen on the scene then discovered that the true nature of the items found at the fire, i.e., mason jars, chemicals consisting of cans of solvent and apparatus consistent with the manufacture of methamphetamine that this fire was caused by a methamphetamine manufacturer. It appeared to Officer Miller and Deputy Gayda that the scene consisted of an illicit operation consisting of a susp, pardon me, a suspicious combination of chemicals and apparatus that either had been used or could be used in the manufacture of methamphetamine. David Reep had chemical

ORIGINAL

burns on the hands, on his hands and was in the process of putting out the fire. Uh, David Reep is the son of Ervin Reep, the homeowner. His parents, Mr. and Mrs. Ervin Reep, also made statements to officers and firemen at the scene that they believed there could be additional items consistent with the manufacture of methamphetamine in David Reep's bedroom located downstairs at 8205 Sunset Lane. Therefore, Your Honor, I am requesting a search warrant for the backyard area of 8205 Sunset Lane and to enter and search the bedroom of David Reep located at the residence of 8205 Sunset Lane. Uh, you know what, Your Honor?

Judge Brown: What?

Nelson: I just realized I have forgotten to get the physical description of the uh, um, if you'd like I can...

Judge Brown: I don't think you need it. You have the address.

Nelson: That's correct and that was my assumption but then I'm kind of reading down a list and I see the physical description thing on there and I went oh, my gosh.

Judge Brown: I think it's alright if you have the address there. Is it a standalone building? It's not an apartment?

Nelson: Yes, it is a standalone home.

Judge Brown: Then that shouldn't be a problem.

Nelson: Okay. I'll continue then, Your Honor. And it's contents, all storage areas and containers located therein as may apply and to seize the following items of evidence as well as dominion papers, documents consistent with the manufacture of methamphetamine. Herein, fail not, Judge Brown, do I have your permission to sign your name to this search warrant?

Judge Brown: Uh, yes, you do.

Nelson: Thank you, Your Honor, the time is now 0816 hours and the date is June 12, 2004.

Judge Brown: Okay, will you need a destruct order?

Nelson: Yes, I will, Your Honor, and it was discussed earlier this morning with one of the other officers that's familiar with this process and she told me that I could probably take care of that Monday morning.

Judge Brown: Oh, okay.

Nelson: Is that uh, sufficient?

Judge Brown: Sure. That will be fine.

Nelson: Okay, Your Honor, thank you very much for all your help.

Judge Brown: Sure.

Nelson: Bye.

Judge Brown: Bye.

End of telephonic search warrant.

APPENDIX C

RCW 9A.44.115. Voyeurism

(1) As used in this section:

...

(c) "Place where he or she would have a reasonable expectation of privacy" means:

(i) A place where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed or filmed by another; or

(ii) A place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance;

(d) "Surveillance" means secret observation of the activities of another person for the purpose of spying upon and invading the privacy of the person.

(e) "Views" means the intentional looking upon of another person for more than a brief period of time, in other than a casual or cursory manner, with the unaided eye or with a device designed or intended to improve visual acuity.

(2) A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films:

(a) Another person without that person's knowledge and consent while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy; or

(b) The intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place.[18]

...

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[18] This last subparagraph (b) was added after the decision in State v. Glas, 147 Wn.2d 410, 54 P.3d 147 (2002).